No. 17-646

In the Supreme Court of the United States

TERANCE MARTEZ GAMBLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY IN SUPPORT OF MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR EXPANDED ARGUMENT

The Court should grant the motion for the amici States to participate in oral argument in this important case concerning whether nearly two centuries of precedent should be overturned. None of petitioner's contrary arguments counsels against the Court hearing from the broad and diverse group of 36 States whose sovereignty petitioner blithely attacks.

1. Petitioner first argues that, because this case involves a subsequent federal prosecution, the States' interests are not implicated. But petitioner's own merits briefing insists that the opposite is true. The question presented—as drafted by petitioner—asks "[w]hether the Court should overrule the 'separate sovereigns' exception to the Double Jeopardy Clause." Pet. Br. i; Pet. i. That formulation does not limit the Court's analysis to a subsequent federal prosecution. To the contrary, petitioner's brief repeatedly attacks "duplicative prosecutions." *See* Pet. Br. 3; *accord* Pet. Br. 6, 36, 43, 45. Petitioner's brief never

suggests that which sovereign goes first matters; under petitioner's view of the law, it does not.

Petitioner's request for certiorari also concerns the separate-sovereignty doctrine simpliciter, without regard to which sovereign prosecutes second. Petitioner argued that his case uniquely presented a clean vehicle for the Court to address that doctrine where previous efforts have faltered: "[A]s is often the case when binding precedent from this Court forecloses a line of argument, cases raising this issue have been few and far between. And those few to have raised it have been riddled with vehicle problems." Pet. 3 (citing *Walker v. Texas*, 137 S. Ct. 1813 (2017) (denying certiorari)). That single case cited by petitioner as having previously raised "this issue"—the issue presented by petitioner— concerned a subsequent prosecution by the State of Texas. *See* Pet. 3. That confirms that the issue presented concerns the separate-sovereignty doctrine as a whole, not just some application of it to successive federal prosecutions. Yet, having secured certiorari and presented argument on "this issue," petitioner now avoids its scope in an effort to shut the States out.

Petitioner's repeated attacks on *Bartkus v. Illinois*, 359 U.S. 121 (1959), confirm that this case implicates the sovereignty of the States. Petitioner's merits brief references *Bartkus* no fewer than 34 times. *Bartkus* involved exactly what petitioner now argues this case does not implicate: a subsequent state prosecution. *See Bartkus*, 359 U.S. at 121-24 (upholding, under the separate-sovereignty doctrine, Illinois's prosecution of Bartkus for robbery following acquittal on a robbery charge in federal court). Indeed, petitioner describes that subsequent state prosecution as "intolerable." Pet. Br. 29.

Moreover, petitioner's purported originalist understanding of the Double Jeopardy Clause relies significantly—indeed, almost entirely—on a series of decisions from state

high courts around the time of the founding and several decades thereafter. *See* Pet. Br. 5, 17-20 (discussing cases from Massachusetts, Michigan, Missouri, North Carolina, South Carolina, Vermont, and Virginia). Petitioner discusses those state cases at length to argue that the "overwhelming weight of state authority" allegedly favors his preferred reading of the Double Jeopardy Clause. Pet. Br. 19. Those state courts were not, of course, sitting in judgment of whether subsequent *federal* prosecutions were proper. Those state courts were considering subsequent *state* prosecutions.

Petitioner's claim that the States have no special interest in the outcome of this case thus contradicts his own briefing. If the Court is inclined to indulge petitioner's attack on the States' sovereignty, it should hear from them at oral argument.

2. Petitioner next argues that amici States do not merit oral argument because their "arguments are fully laid out in their brief." Resp. 3. Amici deserve argument, according to petitioner, only when their views "are not adequately presented in the briefs." Resp. 3. But it would be absurd to incentivize amici to draft incomplete briefs in order to have a chance to present their case orally and answer the Court's questions. Petitioner cites no authority for his counterintuitive proposition. The Court hears from amici routinely, including amici who draft thorough briefs.[1]

---

[1] *See, e.g.*, *Garza v. Idaho*, No. 17-1026 (S. Ct. 2018) (granting leave to the United States to participate in oral argument as amicus curiae); *Knick v. Township of Scott*, No. 17-647 (S. Ct. 2018) (same); *see also Sturgeon v. Frost*, No. 17-949 (S. Ct. 2018) (granting leave to Alaska); *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) (Kansas); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (Texas); *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (New York); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (New York); *Halbert v. Michigan*, 125 S. Ct. 1822 (2005) (Louisiana); *Clingman v. Beaver*, 125 S. Ct. 825 (2005) (South Dakota); *Jackson v. Birmingham Bd. of Educ.*, 125 S. Ct. 457 (2004) (Alabama); *City of Burbank v. Lockheed Air Terminal, Inc.*, 409 U.S. 1073 (1972) (California).

3. Lastly, petitioner argues that, if the amici States had a "truly substantial" interest in this case, "Respondent would surely have offered to divide its argument time." Resp. 3. Again, petitioner cites no authority, perhaps because that argument makes no sense. As set out in the amici States' brief, the United States and the amici States have overlapping yet distinct interests. The fact that the United States wishes to use its full 30 minutes of argument time to defend its own interests against petitioner's arguments in no way undercuts the importance of this case to the amici States.

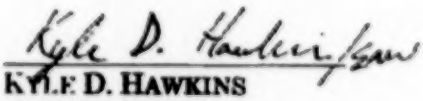
* * *

Petitioner does not deny that he will suffer no prejudice if the amici States' motion is granted. He explicitly requests that his own time be expanded by 10 minutes in the event that the Court grants the amici States' motion. Resp. 3. That is a sensible solution—one that all sides can accept. Petitioner further does not deny that the amici States' request is workable, as this is the only case scheduled for argument on December 5. When a case implicates state interests this important, there is every reason to permit the modest increase in argument time that the amici States seek so that they might have a full opportunity to defend the interests that petitioner attacks.

CONCLUSION

The amici States respectfully request that the Court grant the motion to participate in oral argument and for ten minutes of argument time.

Respectfully submitted.



KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.]: (512) 936-1700
[Fax]: (512) 474-2697
kyle.hawkins@oag.texas.gov

KYLE D. HAWKINS
Solicitor General
Counsel of Record

J. CAMPBELL BARKER
Deputy Solicitor General

ERIC A. WHITE
ARI CUENIN
Assistant Solicitors General

Counsel for Amici Curiae

NOVEMBER 2018